GWEE TONG HIANG v. BOO CHENG HAU

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
BADARIAH SAHAMID JCA
PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: J-02(NCVC)(W)-381-03-2015]
14 MARCH 2016

TORT: *Defamation – Claim based on innuendo – Newspaper articles imputing innuendos against plaintiff – Whether articles must refer specifically to plaintiff – Whether words which raise defamatory imputations against a group was actionable by individual members – Whether impugned statements defamatory and actionable by plaintiff*

TORT: *Defamation – Defences – Justification and fair comments – Newspaper articles imputing innuendos against plaintiff – Whether defendant justified that plaintiff was involved in shady and suspicious property dealings – Whether defendant answered 'sting' of charge against plaintiff – Whether an ordinary reasonable reader reading articles would understand it as comments – Whether comments in articles were unfair treatment against plaintiff – Whether formed strong evidence of malice – Whether defences available to defendant*

The appellant ('plaintiff') and the respondent ('defendant') were political members of the Democratic Action Party of Malaysia ('DAP'). Political rivalry and animosity began to brew between the plaintiff and the defendant and various allegations and cross-allegations were made between them to that effect. The plaintiff alleged that the defendant had defamed him *vide* newspaper articles ('the impugned articles'), which formed the subject matter of the suit against the defendant. The crux of the defamatory elements in the impugned articles were (i) the innuendoes pointing to the plaintiff being involved in gangsterism; and (ii) suspicious dealings in the Muar DAP Service Centre building purchase and that the plaintiff was not a suitable candidate for election. The trial judge found that the impugned statements in relation to the allegation of the plaintiff being involved in gangsterism to be defamatory, but dismissed the claim because there was no reference to the plaintiff. The second allegation with regard to the purchase of the Muar DAP service centre was found to be defamatory but the trial judge found the defendant had successfully raised the defences of justification and fair comment. Hence, this appeal against the dismissal of the plaintiff's claim.

Held (allowing appeal; setting aside order of High Court)
Per Prasad Sandosham Abraham JCA delivering the judgment of the court:

(1) There was no necessity for the impugned articles to refer specifically to the plaintiff. The law recognises that words which raise defamatory imputations against a group will be actionable by individual members if they can demonstrate that the impugned words cast imputations on

them individually and the words refer to the plaintiff and, in the circumstances of the publication, the plaintiff was the person aimed at in the group. Taking into account the animosity between the plaintiff and the defendant and that the members of DAP in Johore Utara were suspected to have secret society links and the photograph of the plaintiff appearing in the impugned articles, all pointed to the plaintiff in the ascertainable group *ie*, DAP members in Johore Utara. Therefore, the impugned statements on gangsterism were found to be defamatory and actionable by the plaintiff. (paras 9, 10, 11 & 13)

(2) The defence of justification by showing tenuous circumstantial evidence and inferences cannot sustain a plea of justification. It was clear from the evidence that the purchase of the Muar DAP Service Centre was taken after a meeting of a committee. It was a committee decision and not that of the plaintiff. The defendant had clearly not justified that the plaintiff was involved in shady and suspicious property dealings nor that the plaintiff was without integrity. Whilst there was a Malaysian Anti-Corruption Commission investigation pending, the plaintiff had never been charged with corruption or cheating or any form of misappropriation or impropriety. In fact there was no evidence at all to support the allegation that the plaintiff had committed any crime. The defendant had failed to answer the 'sting' of the charge against the plaintiff, thus reducing the impugned statements by the defendant to mere bald defamatory statements. (paras 17, 18 & 20)

(3) The test in deciding whether the impugned words are facts or comments is an objective one, namely, whether an ordinary reasonable reader reading the impugned article would understand the words as comments. The assertions in the impugned articles were far from being fair comment as many of the factual basis of such statements were incorrect. Any fair minded reasonable reader would not refer to the impugned article as comments let alone being fair but were in fact statements. The comments expressed in the impugned statements were unfair in their treatment of the plaintiff. Further, the internal affairs of a political party such as DAP was not a matter of public interest. The plea of fair comment must therefore fail. (paras 24 & 25)

(4) Malice is where the impugned article has been misused for some purpose other than that for which the privilege is accorded by law. Malice can be inferred where a privileged occasion is used to further the political interest of the defendant and also inferred from matters intrinsic to the impugned statements itself, the scurrilous and venomous nature of the impugned articles. The tenor of the impugned statements showed that the defendant was attempting to smear and tarnish the plaintiff's political reputation to secure the defendant's own political position within the DAP. Looking at the impugned statements in its entirety, they formed strong evidence of malice. (paras 26, 27 & 28)

***Bahasa Malaysia** Headnotes*

Perayu ('plaintif') dan responden ('defendan') adalah ahli politik Democratic Action Party of Malaysia ('DAP'). Plaintif mendakwa bahawa defendan memfitnahnya melalui artikel-artikel surat khabar ('artikel-artikel yang dipersoalkan'), yang membentuk hal perkara guaman terhadap defendan. Asas elemen fitnah dalam artikel-artikel yang dipersoalkan adalah (i) innuendo yang menunjukkan plaintif terlibat dalam kegiatan samseng; dan (ii) urusan yang menimbulkan kesangsian dalam pembelian bangunan pusat perkhidmatan DAP Muar dan bahawa plaintif bukan calon yang sesuai bagi pilihan raya. Hakim bicara mendapati bahawa artikel-artikel yang dipersoalkan berkaitan dengan dakwaan plaintif terlibat dalam kegiatan samseng bersifat memfitnah, tetapi menolak tuntutan tersebut atas alasan tiada rujukan kepada plaintif. Dakwaan kedua berkaitan dengan pembelian pusat perkhidmatan DAP Muar diputuskan bersifat memfitnah tetapi hakim bicara memutuskan bahawa defendan berjaya membangkitkan pembelaan justifikasi dan ulasan wajar. Dengan itu, rayuan terhadap penolakan tuntutan plaintif.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)
Oleh Prasad Sandosham Abraham HMR menyampaikan penghakiman mahkamah:

(1) Artikel-artikel yang dipersoalkan tidak perlu merujuk kepada plaintif secara spesifik. Undang-undang mengiktiraf perkataan-perkataan yang membangkitkan tohmahan terhadap kumpulan boleh diambil tindakan oleh ahli-ahli individu jika mereka boleh menunjukkan bahawa perkataan-perkataan yang dipersoalkan mentohmah mereka secara individu dan perkataan-perkataan tersebut merujuk kepada plaintif dan dalam hal keadaan penerbitan tersebut, plaintif adalah orang yang ditujukan dalam kumpulan itu. Mengambil kira permusuhan antara plaintif dan defendan dan bahawa ahli-ahli DAP di Johor Utara disyaki mempunyai kaitan dengan pertubuhan rahsia dan gambar plaintif yang timbul dalam artikel-artikel yang dipersoalkan, kesemuanya merujuk kepada plaintif dalam kumpulan yang boleh dikenal pasti iaitu ahli-ahli DAP Johor Utara. Oleh itu, kenyataan-kenyataan berkaitan kegiatan samseng didapati memfitnah dan boleh diambil tindakan oleh plaintif.

(2) Pembelaan justifikasi dengan menunjukkan keterangan hal keadaan dan inferens-inferens kecil tidak boleh mengekalkan pli justifikasi. Jelas daripada keterangan bahawa pembelian pusat perkhidmatan DAP Muar dibuat selepas mesyuarat jawatankuasa. Ia adalah keputusan jawatankuasa dan bukan plaintif. Defendan jelas tidak mempunyai justifikasi bahawa plaintif terlibat dalam urusan hartanah yang samar-samar dan meragukan dan plaintif juga bukan orang yang tidak mempunyai integriti. Walaupun ada siasatan Suruhanjaya Pencegahan

Rasuah Malaysia yang masih berjalan, plaintif tidak pernah dipertuduh dengan rasuah atau menipu atau apa-apa bentuk penggelapan atau perbuatan salah. Hakikatnya, tiada langsung keterangan yang menyokong bahawa plaintif melakukan apa-apa kesalahan. Defendan gagal menjawab 'sengatan' pertuduhan terhadap plaintif, menjadikan kenyataan-kenyataan yang dipersoalkan oleh defendan hanya kenyataan-kenyataan memfitnah semata-mata.

(3) Ujian untuk menentukan sama ada perkataan-perkataan yang dipersoalkan adalah fakta atau ulasan adalah objektif iaitu sama ada seseorang pembaca biasa yang membaca artikel-artikel yang dipersoalkan akan memahami perkataan-perkataan tersebut sebagai ulasan. Penegasan dalam artikel-artikel yang dipersoalkan adalah jauh daripada ulasan wajar kerana kebanyakan asas fakta kenyataan-kenyataan tersebut tidak benar. Seseorang pembaca yang berfikiran waras tidak akan merujuk kepada artikel-artikel yang dipersoalkan sebagai ulasan apatah lagi yang wajar tetapi adalah kenyataan. Ulasan-ulasan yang dinyatakan dalam artikel-artikel yang dipersoalkan tidak wajar terhadap plaintif. Malahan, urusan dalaman parti politik seperti DAP bukan perkara berkepentingan umum. Oleh itu, pli ulasan wajar semestinya gagal.

(4) Niat jahat adalah di mana artikel-artikel yang dipersoalkan disalahgunakan bagi tujuan selain daripada untuk yang mana keistimewaan diberikan oleh undang-undang. Niat jahat boleh disimpulkan daripada peristiwa khas yang digunakan untuk melanjutkan kepentingan politik defendan dan juga disimpulkan daripada perkara yang tersirat dalam kenyataan-kenyataan yang dipersoalkan itu sendiri, artikel-artikel yang bersifat cabul dan menyakitkan hati. Maksud kenyataan-kenyataan yang dipersoalkan menunjukkan bahawa defendan cuba untuk memburukkan dan mencemarkan reputasi politik plaintif untuk mendapatkan kedudukan politik defendan sendiri dalam DAP. Berdasarkan kenyataan-kenyataan yang dipersoalkan secara keseluruhannya, ia membentuk keterangan niat jahat yang kuat.

Case(s) referred to:

Abdul Halim Abd Majid & Ors v. Ng Say Hoe (Civil Appeal No: B-02(NCVC)(W)-948-05-2014) (Unreported) ***(refd)***

Abdul Rahman Talib v. Seenivasagam & Anor [1964] 1 LNS 2 HC ***(refd)***

Ahmad Said v. Zulkiflee Bakar & Yang Lain [1997] 1 LNS 427 HC ***(refd)***

Arul Chandran v. Chew Chin Aik Victor JP [2001] 1 SLR 505 ***(refd)***

Chen Cheng & Anor v. Central Christian Church and Other Appeals [1999] 1 SLR 94 ***(refd)***

DHKW Marketing & Anor v. Nature's Farm Pte Ltd [1999] 2 SLR 400 ***(refd)***

Horrocks v. Lowe [1975] AC 135 ***(refd)***

Tan Chor Chuan & Ors v. Tan Yeow Hiang Kenneth & Ors [2006] 1 SLR 16 ***(refd)***

The Institute of Commercial Management United Kingdom v. The New Straits Times Press (Malaysia) Bhd [1993] 2 CLJ 365 HC ***(refd)***
Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***

For the appellant - Gideon Tan, Alfred Lai & KM Ong; M/s KM Ong, Lee & Co
For the respondent - R Jayabalan & Norman Fernandez; M/s C Sukumaran & Co

[Editor's note: For the High Court judgment, please see Gwee Tong Hiang v. Boo Cheng Hau [2015] 1 LNS 551 (overruled)].

Reported by S Barathi

JUDGMENT

Prasad Sandosham Abraham JCA:

[1] We heard and disposed of this appeal on 26 October 2015 wherein we allowed the appeal and the older of the High Court be set aside. This was an appeal against the order of the High Court dated 29 January 2015 dismissing the appellant's claim with costs and we now append our grounds for so doing. We shall refer to the parties as they were referred to in the High Court ie, the appellant as plaintiff and the respondent as defendant.

Material Facts

[2] The plaintiff and the defendant at all material times were political members of the Democratic Action Party of Malaysia (hereinafter known as "DAP") wherein the plaintiff was holding the position as Chairman of Bentayan Branch Muar, whereas the defendant was holding the position as Chairman of DAP Parliamentary Liason Committee at Gelang Patah Johore.

[3] Political rivalry and animosity began to brew between the plaintiff and the defendant, and various allegations, and cross allegations were made between them to that effect.

[4] The plaintiff was nominated by the DAP to stand for the State Assembly seat in the constituency of Bentayan, and was elected on 8 March 2008.

[5] Despite this, the rivalry and animosity between the plaintiff and the defendant continued.

[6] The plaintiff alleged that the defendant had defamed him *vide* newspaper articles (the impugned articles) which formed the subject matter of this suit. The learned judge has set out in para 1.14 of his judgment (RR Jilid X (10) tambahan (pp. 12-13) (see also pp. 37-109 of the statement of claim RR Jilid I), the impugned statements.

[7] The plaintiff alleges that the impugned articles were defamatory in nature and the crux of the defamatory elements in the impugned articles were:

(a) The innuendos pointing to the plaintiff being involved in gangsterism; and

(b) Suspicious dealings in the Muar DAP Service Centre building purchase and that the plaintiff was not a suitable candidate for election.

The defendant denies these imputations.

The Defamatory Part Of The Impugned Statement In Relation To Allegation Of The Plaintiff Being Involved In Gangsterism

[8] The impugned articles were carried in the China Press dated 28 July 2009 (see pp. 17-26 RR Jilid I). The learned judge dealt with this first allegation rather *simpliciter* by finding that the first impugned article makes no reference to the plaintiff (see pp. 22-26 RR Tambahan Jilid X (10)).

[9] The law recognises that words which raise defamatory imputations against a group will be actionable by individual members if they can demonstrate the impugned words cast imputations on them individually and the words refer to the plaintiff and in the circumstances of the publication that the plaintiff was the person aimed at in the group.

[10] Taking into account the animosity, between the plaintiff and the defendant and that the members of DAP in Johore Utara are suspected to have secret society links and the photograph of the plaintiff appearing in the impugned articles, all point to the plaintiff in the ascertainable group ie, DAP members in Johore Utara.

[11] This principle in law was never addressed by the learned judge in that there was no necessity from the impugned articles to refer specifically to the plaintiff. We refer to the case of *DHKW Marketing & Anor v. Nature's Farm Pte Ltd* reported in [1999] 2 SLR 400 a decision of the High Court in Singapore where it was held by Judith Prakash J and we quote:

> Quite apart from being a member of the class that was defamed, since the advertisement did not specifically name them, the plaintiffs would have to show that it or words therein referred to or were understood as referring to the plaintiffs. The test on reference is set out in *Gatley* at pp. 162-163 as follows:
>
> > *The test of whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognised; and whether that description takes the form of a word picture of an individual or the form of a reference to a class of persons of which he*

> *is or is believed to be a member, or any other form, if in the circumstances the description is such that the person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is a sufficient reference to him.*
>
> In fact, as Mr Thio submitted, even if the plaintiffs in a defamation case do not call or are unable to call witnesses to give evidence of reference, the court can still make a finding of reference. It is sufficient for the plaintiffs to allege and prove that there are persons who know the special facts and so might understand the words complained of in the defamatory sense without proving that any person did in fact understand them in that sense. See *Hough v. London Express Newspaper Ltd* [1940] 2 KB 507. Also as *Gatley* states in the passage cited at para 18 above, where the words refer to a class, the question is whether a reasonable reader could conclude that each of the plaintiffs, as an individual was pointed at.
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> (emphasis added)

[12] This approach was followed in the case of *Ahmad bin Said v. Zulkiflee Bakar & Yang Lain* reported in [1997] 1 LNS 427; [1997] 5 MLJ 542 where it was held by Mohd Saari J (as he then was) and we quote:

> The plaintiff's statement that no group from another division in Terengganu had toured Europe during the same time could be treated as an admission by the defendant since no evidence to the contrary was adduced. Therefore, although the first report AS1 did not mention the plaintiff as a member of the group which visited Europe, since there was no other group from another division in Terengganu touring Europe during that period the plaintiff was easily identifiable as one of the participants in that group, bearing in mind also he was a member of the State Legislative Council, of the State Exco and an UMNO Youth Leader for the Kemaman Division. Therefore, the statement 'UMNO leaders and members from a division in Terengganu' undoubtedly referred to the plaintiff (see pp 546F-I and 547A-C); *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 MLJ 281 and *Knuppfer v. London Express Newspapers Ltd* [1943] 1 KB 8 followed.

[13] The learned judge had found the impugned statements to be defamatory but dismissed the claim because there was no reference to the plaintiff. Based on the aforesaid authorities, the learned judge erred in law and we find the impugned statements on gangsterism defamatory and actionable by the plaintiff.

Second Allegation With Regard To The Purchase Of The Muar DAP Service Centre

[14] As the learned judge found that the impugned statements *per se* were defamatory, we only have to consider the learned judge's treatment of the defences raised by the defendant (see pp. 26-30) RR Jilid X (10) Tambahan).

[15] With regards to this allegation, the learned judge found the same to be defamatory in nature. However the learned judge also found that the defendant had successfully raised the defences of justification and fair

comment, both of which had been pleaded in the defence. In this regard we would quote the relevant portion of the learned judge's grounds of judgment found at pp. 26-30 of the RR Vol. X (10):

> 7.2.1. Whether the impugned statements with regard to the purchase of the Muar DAP Service Centre had conveyed the meaning or had implied that:
>
> (a) The Plaintiff was involved in shady and suspicious property dealings.
>
> (b) The Plaintiff was without integrity.
>
> (c) The Plaintiff was involved in corruption and or misappropriation and or cheating and or impropriety and or malpractice etc.
>
> (d) That the Plaintiff had committed a crime and was investigated as submitted by the Plaintiff.
>
> Since it is not in dispute that the impugned statements with regard to the purchase of the Muar DAP Service Centre were published by the Defendant and the impugned statements referred to the Plaintiff, the sole question is whether the impugned statements were defamatory. For convenience, I shall reproduce the main relevant excerpts of the Defendant's statements with regard to the purchase of the Muar DAP Service Centre as follows:
>
> (a) "Defendant was the mastermind in the said transaction, responsible to collect and arrange, he must be responsible in this affair."
>
> (b) "A lot of members felt suspicious as regards the building that was purchased because it involves a Bumiputra Unit, why the purchaser was a Singaporean lady and she could take the profit of RM25,000.00 Defendant said the transaction was not proper and full of suspicion."
>
> "when we think of that transaction of RM300,000.00 taking commission of 8%. If it involved RM3 million, then it would become RM250K. If we form the government, can we allow such thing to happen?"
>
> (c) The Defendant said in the said transaction that the Plaintiff mentioned that he had given RM25,000.00 as commission to a Singaporean lady as the original purchaser.
>
> (d) "People who committed an offence always attacked him and also opposed the State Committee? Where was the integrity of the party?"
>
> (e) "He said there had been questions over the price of the property with figure of between 275K and 300K being stated and payment of RM25K to an agent. It also queried the land status of the property."
>
> (f) The MACC was investigating the alleged discrepancies involving the purchase of the Muar DAP Service Centre following a disclosure made by a party leader Dr. Bo Cheng Hau on Monday"
>
> (g) "That Dr. Boo had said that in a press conference on Monday that a DAP inquiry into the purchase price of RM300K Service Centre revealed conflicting price."

(h) "That Dr. Boo added that the inquiry was told that the property was valued at RM275K when it was bought in 2004 but the amount had increased to RM290K in 2007."

Having perused the impugned statements and the meanings that they conveyed or implied to convey and having heard the submissions by both the Plaintiff and the Defendant, I find that they are defamatory and would have the effect of lowering the Plaintiff in the estimation of the right thinking members of the public in general. (emphasis added)

Plea Of Justification

[16] In order to successfully raise the defence of justification, the defendant had to prove that the substance or "sting" of the impugned statements were true. In the case of *Tan Chor Chuan and Ors v. Tan Yeow Hiang Kenneth and Ors* [2006] 1 SLR 16 where it was held by Andrew Ang J in the High Court in Singapore and we quote:

The defence of justification required a defendant to prove that the words in issue, in their natural and ordinary meaning, were true in substance and in fact. If the defendant proved that the main charge, or gist, of the libel was true, there was no need for him to justify statements or comments which did not add to the sting of the charge.

[17] In our present case, it is clear from the evidence that the purchase of the Muar DAP Service Centre was taken after a meeting of a committee. It was a committee decision and not that of the plaintiff. It is also our view that the defendant had clearly not justified that the plaintiff was involved in shady and suspicious property dealings nor that the plaintiff was without integrity (see minutes of meeting of State of DAP AJK ke 6 Penggal ke-13 dated 13 June 2004 at p. 910 RR Jilid V para. 9.5).

[18] Whilst there was an MACC investigation pending, the plaintiff had never been charged with corruption or cheating or any form of misappropriation or impropriety. In fact there was no evidence at all to support that the plaintiff has committed any crime. All that we have are mere suspicion of members as to why the Singaporean lady was paid a commission of RM25,000.

[19] The other allegation was that the property was a Bumiputera lot. However there is evidence to show that the restriction on it being a Bumiputera lot had been lifted, the property had been transferred and now been registered in the name of the trustees for DAP and on behalf of its members.

[20] We are of the view that the defence of justification by showing tenuous circumstantial evidence and inferences cannot sustain a plea of justification and the learned judge erred in law in finding that the defence of justification has been made out. We refer to the judgment of Tan Lee Meng J in the case of *Arul Chandran v. Chew Chin Aik Victor JP* [2001] 1 SLR 505 (CA) at paras. 28-29 of the judgment which we now set out:

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> One of the main defences relied upon by Mr Chew was justification. The law of defamation presumes that defamatory words are false and the plaintiff need do more than prove that the defamatory words have been published by the defendant. The burden is then on the defendant, if he wishes to rely on the defence of justification, to prove that those words are true.

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> As has been mentioned, the judicial commissioner found that the crucial sting in all three publications is the charge that Mr Arul is an extremely vicious and dangerous fraud. Mr Chew need not prove the truth of every detail of the words published, but the justification must meet the sting of the charge …

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[21] According to SP15, Lim Sey Wee a veteran DAP member, a conveyancing lawyer handling the sales and purchase, application for the Bumi lot release and transfer of the said property was made, (see email from SP15 to the defendant p. 921, RR Jilid V), A1 SP15 confirmed that Madam Lim Ah Tang (the Singaporean lady) agreed to sell at RM300,000 to make

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a gain of RM25,000. The developer confirmed the same. SP15 stated that since no formal agreement was executed between the developer and the supplier (Sepakat) S Madam Lim, he was told to prepare a formal SPA for execution by the party's trustees and the developer after release of the Bumi lot. The developer said it would execute SPA for RM275,000 only because

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they did not make the gain of RM25,000 (Madam Lim made the gain). So SP15 described the RM25,000 as commission to account for the payment of RM25,000 to her. SP15 made Madam Lim sign the official receipt of RM25,000 in her favour as this payment was not a secret as it was documented and witnessed by SP15. SP15 further stated that if they wanted

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to have an all-out war he can challenge them to repeat their allegation in English or Bahasa Malaysia and lodge police or ACA report, so that he can save the trouble of having to translate into Bahasa Malaysia for defamation court action and they are destroying party's image and UMNO would be most happy (see pp. 923 of RR, Jilid VI).

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[22] We find that the defendant had failed to answer the "sting" of the charge against the plaintiff, thus reducing the impugned statements by the defendant to mere bald defamatory statements.

Plea Of Fair Comment

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[23] The learned judge dealt with the defence of fair comment (pp. 30-39 of grounds of judgment, RR Vol. X (10)). For this defence to be sustained, the following four elements must be present namely:

a) the words complained about must be comment;

b) the comment must be based on true facts;

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c) the comment or opinion expressed must be fair; and

(d) for the comment must be on the matter of public interest. (See *The Institute of Commercial Management United Kingdom v. The New Straits Times Press (Malaysia) Bhd* [1993] 2 CLJ 365)

For the defendant to succeed on this defence, all four elements must be proved.

Comment

[24] The test in deciding whether the impugned words are facts or comments is an objective one namely whether an ordinary reasonable reader on reading the impugned articles would understand words as comment. The statement must be recognisable as comment by ordinary reasonable fair minded readers having regard to the whole context of publication. We refer to the case of *Chen Cheng & Anor v. Central Christian Church and Other Appeals* [1999] 1 SLR 94 (CA), a decision of the Singapore Court of Appeal where the court held:

> It was difficult to distinguish between an assertion of fact and a comment. At the end of the day much depended on how the defamatory statement was expressed, the context in which it was set out and the content of the entire article or passage in question. One should adopt a common sense approach and consider how the statement would strike the ordinary reasonable reader, ie whether it would be recognisable by the ordinary reader as a comment or a statement of fact.

(see also *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393 at p. 408)

[25] Looking at the impugned articles, we find that the assertion in these articles are far from being fair comment bearing in mind that many of the factual basis of such statements were incorrect (see *Abdul Halim bin Abdul Majid & 77 Ors v. Ng Say Hoe* in appeal B-02(NCVC)(W)-947-05-2014, a judgment of the Court of Appeal). Any fair minded reasonable reader of the impugned articles, in our view, would certainly respond when asked, that the comments in the impugned articles can by no stretch of the imagination be referred to as comments let alone being fair but were in fact statements. We have already pointed out the factual basis from which these impugned statements were made are at best based on suspicion. Further it is our view the comments expressed these impugned statements are unfair in their treatment of the plaintiff. We further find that the internal affairs of a political party such as DAP is not a matter of public interest. For those reasons we find that the plea of fair comment must necessarily fail.

Issue Of Malice

[26] Even if we are wrong in our conclusion that the defence of fair comment has not been made out, we would hold that the "sting" of the impugned statements is smacked of malice. In our view, this is not the case of the defendant exercising his duties to ensure transparency and

A accountability but to essentially malign the plaintiff as the plaintiff poses a political threat to the defendant. In fact the tenor of the impugned statements will show in our view that the defendant was attempting to smear and tarnish the plaintiff's political reputation to secure the defendant's own political position within the DAP. This in our view clearly smacks of malice. For
B instance in the impugned first article, in the China Press, the defendant stated that:

> Beliau berkata, ramai ahli berasa curiga tentang bangunan yang dibeli tersebut kerana bangunan tersebut adalah unit bumiputra, mengapa pembelinya pula adalah seorang wanita Singapura; dan beliau pula
C mengambil keuntungan sebanyak RM25,000.00.
>
> Beliau terus menunjukkan bahawa Gwee Tong Hiang adalah dalang dalam transaksi ini, beliau sepatutnya bertanggungjawab dalam hal ini …
>
> Tetapi sehingga kini, Ahli Jawatankuasa Pusat bukan sahaja tidak mahu dengar dan tanya, bahkan menamakan Gwee Tong Hiang sebagai calon
D pilihanraya pada tahun lepas tanpa kelulusan dan Ahli Jawatankuasa Kecil Pilihanraya Kecil.
>
> Orang yang sepatut letak jawatan bukan saya, yang sepatut letak jawatan adalah orang yang telah mengingkari keputusan sebulat suara.

E (see p. 56 of the RR Jilid I)

In the impugned third article in Guang Ming Daily, the defamatory words are:

> Pengerusi DAP Johor Boo Cheng Hau tidak puas hati dengan Pengerusi Pusat Perkhidmatan DAP Muar Gwee Tong Hiang telah mendapat
F pencalonan daripada Pimpinan Pusat sebagai calon Dun Bentayan Muar.
>
> Gwee Tong Hiang terlibat dalam kes mengambil komisyen bagi bangunan Wisma DAP dan kes telah diserah kepada Jawatankuasa Disiplin untuk mengambil tindakan. Beliau bukan seorang calon yang ideal namun Pemimpin Pusat masih mengesyorkan beliau.
>
G Pimpinan Pusat tidak sepatutnya menghantar calon yang kontroversi untuk bertanding.
>
> Saya menegaskan bahawa jika terdapat sebarang masalah semasa menghantar Gwee Tong Hiang sebagai calon, pimpinan Negeri tidak akan bertanggungjawab dari segi undang-undang mahupun politik terhadapnya
H (menunjukkan Gwee Tong Hiang).

Thus looking at the language of the impugned articles, it reflects the political rivalry between the parties and the intent behind it clearly shows the ill feel of the defendant towards the plaintiff for being chosen as a candidate in the general election.

I **[27]** The meaning of malice is where the impugned article has been misused for some purpose other than that for which the privilege is accorded by law. For example where a defendant has given vent to personal spite or ill will

towards a person, he defames. It is our view that malice can be inferred where a privileged occasion is used to further the political interest of the defendant. We refer to the case of *Abdul Rahman Talib v. Seenivasagam & Anor* [1964] 1 LNS 2; [1965] 1 MLJ 142b and to the judgment of Hepworth J at p. 157 and we quote:

> The existence of indirect motive or malice may be proved by extrinsic evidence, that is, something outside the libel itself, eg, by expressions of personal spite or ill-will towards the plaintiff or by threats made against him, by showing that the defendant had some previous quarrel with the plaintiff, or brought unsuccessful actions against him. So anything that shows that the plaintiff and the defendant lived on bad terms may bear on the issue of malice.
>
> Where the plaintiff must prove express malice, if he can show any example of spite or indirect motive, whether before or after the publication, he would establish his case, provided that the examples given are so connected with the state of mind of the defendant as to lead to the conclusion that he was malicious at the date when the libel was published. No doubt the evidence must be more consistent with malice than with an honest mind, but this does not mean that all the evidence adduced of malice towards the plaintiff on the part of the defendant must be set against such evidence of a favourable attitude towards him as has been given. On the contrary, each piece of evidence must be regarded separately and even if there are a number of instances where a favourable attitude is shown, the case tending to establish malice would be sufficient evidence on which to find for the plaintiff. Nevertheless each particular instance of alleged malice must be carefully analysed, and if the result is to leave the mind in doubt then that piece of evidence is valueless as an instance of malice, whether it stands alone or is combined with a number of similar instances.
>
> But malice is not only provable by extrinsic evidence: it may be intrinsic, that is, to be inferred from the terms of the alleged libel itself. It may be that the language used in a libel, though under other circumstances justifiable, may be so much too violent for the occasion and circumstances as to form strong evidence of malice, and that an inference of actual malice may be drawn from its use.

We also refer to the case of *Horrocks v. Lowe* [1975] AC 135 in particular to the judgment of Viscount Dilhorne at p. 145 and we quote:

> These observations which I have cited were directed to the issue whether there was or was not express malice, but I think that in considering whether or not there was gross and unreasoning prejudice on the part of the respondent no nice scales should be used and that the fact that he made observations and comments which others would not have thought it justified or right to make does not, to my mind, exclude the possibility that they were made, not on account of prejudice, but by reason of his failure to appreciate the inadequacy of the grounds on which he based his comments.

A However this may be, the question now to be decided is whether the finding of malice, based on Stirling J's conclusion that there was gross and unreasoning prejudice, can stand in view of his finding that the respondent believed what he said.

If a man abuses a privileged occasion by making defamatory statements which he knows to be false, express malice may easily be inferred.

B

If, on such an occasion, he makes statements recklessly, not caring whether they be true or false, again malice may be inferred. Such recklessness may be induced by anger, as Lord Esher M.R. pointed out in *Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson* 1892] 1 QB 431, 444. Lord Esher M.R. went on to say that gross and unreasoning prejudice not only with regard to particular people, but with regard to a subject matter in question, would have the same effect. If a person charged with the duty of dealing with other people's rights and interests has allowed his mind to fall into such a state of unreasoning prejudice in regard to the subject matter that he was reckless whether what he stated was true or false, there would be evidence upon which a jury might say that he abused the occasion.

C

D

[28] Malice can be inferred from matters intrinsic to the impugned statements itself, the scurrilous and venomous nature of the impugned articles. Having looked at the impugned statements in entirety, we are of the view that they form strong evidence of malice.

E

[29] For all the aforesaid reasons, we would allow this appeal and the order of the High Court be set aside and the matter be sent back to the Registrar of the High Court for damages to be assessed.

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I